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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~626~~ 3

JUNIUS IRVING SCALES,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OCTOBER TERM, 1955

JUNIUS IRVING SCALES, *Petitioner*,

v.

UNITED STATES OF AMERICA.

No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioner, Junius Irving Scales, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on November 7, 1955.

Opinion Below

The opinion of the court below (Appendix A, *infra*, pp. 25-45) has not yet been officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on November 7, 1955, and a petition for rehearing was denied on November 17, 1955. By order of Chief Justice Warren, the time for filing a petition for certiorari was extended to January 6, 1956, and by subsequent order of Mr. Justice Clark the time for such filing was extended to and including January 16, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

The Circuit Court of Appeals for the Fourth Circuit affirmed a judgment of the District Court of the United States for the Middle District of North Carolina, entered upon a jury verdict under an indictment, finding the petitioner guilty under the so-called "membership clause" of the Smith Act (Act of June 28, 1940, 18 U. S. C. 2385), proscribing membership in any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of the Government of the United States by force or violence, with knowledge that the purposes of the group of persons are such. It is not disputed that the petitioner was a member of the Communist Party during the three-year period prior to the indictment. The questions are:

1. Whether the "membership clause" of the Smith Act is unconstitutional on its face, or as applied to the facts of this case;

2. Whether the indictment charges an offense under the laws of the United States, in view of Section 4(f) of the Internal Security Act of 1950 (50 U. S. C. 783(f)), which provides that neither the holding of office nor membership in any Communist organization shall constitute *per se* a violation of that or any other criminal statute;

3. Whether the evidence was sufficient to support the judgment of conviction under the Smith Act; and

4. Whether, in four particular and important respects, petitioner was denied a fair trial.

Statutes Involved

The relevant provisions of the Constitution of the United States, the Smith Act, the Internal Security Act of 1950,

the Communist Control Act of 1954 (50 U. S. C. 841) and the federal statutes governing the qualifications and empanelling of jurors (28 U. S. C. 1861, 1864) are set forth in Appendix B, *infra*, pp. 46-51.

Statement

The petitioner has not been accused or convicted of helping to organize the Communist Party, or of advocating the overthrow of the United States Government by force and violence. He has not been accused or convicted of conspiring for such purposes, or of participating in a conspiracy of any kind. He has not been accused or convicted of any *act* whatever, other than being (or, more accurately, not ceasing to be) a member of the Communist Party.

The indictment (Pet. App. 2-3),[1] returned on November 18, 1954, charges that the Communist Party is and has since January 1946 been a group of persons who advocate overthrowing the United States Government by force and violence; that Junius Irving Scales is and has since January 1946 been a member of the Communist Party; that Scales knew the Party to be a group of persons who advocate violent overthrow; and that Scales intended "to bring about such overthrow by force and violence as speedily as circumstances would permit".

The trial opened April 11 and ended April 22, 1955. It was conceded by the prosecution (and the Trial Judge so charged, Pet. App. 4) that Scales' criminal act had to be committed between November 18, 1951 and November 18, 1954, the three-year limitations period preceding the indictment. It was acknowledged by Scales (and the Trial Judge so informed the jury, Pet. App. 7), that he was a

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[1]References designated "Pet. App." are to the Appendix to petitioner's brief as appellant in the court below; those designated "Govt. App." are to the Appendix to the Government's brief below; those designated "Tr." are to the trial transcript.

member of the Communist Party within the statutory period.[2]

The prosecution called three witnesses. The first was Lautner, a paid consultant for the Department of Justice and formerly a Communist. He had never met or had any contact with Scales, and had left the Communist Party in 1950, nearly two years before the limitations period. His testimony (Govt. App. 2-23) was limited to the identification of various publications used in Communist circles and to the expression of his opinion, based on these documents and his personal experience while a Communist, that the Party advocated the destruction of the Government by force and violence (Govt. App. 17-23).

The second witness, Clontz, made contact with Scales in North Carolina in 1948 and joined the Communist Party there in 1950, by pre-arrangement with the Federal Bureau of Investigation (Govt. App. 24). He went to New York City in March 1951, and all but one item[3] of his testimony relates to occurrences prior to the statutory period. His conversations with Scales before joining the Party were heavily relied on by the Government, to show Scales' knowledge of the Party's aims (Govt. App. 24-55). The court below, in ruling that there was sufficient evidence to support the conclusion that Scales knew that the Party advocated violent overthrow, relied principally (apart from Scales' membership and official position in the Party) on a single conversation between Scales and Clontz in December 1948[4], nearly six years before the indictment was brought.

The third Government witness, Childs, likewise joined the Party as an observer for the Federal Bureau of Inves-

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[2]Petitioner is publicly known as Chairman of the Communist Party in North Carolina.

[3]Clontz testified to a telephone conversation with Scales in December of 1951 (Govt. App. 55).

[4]The conversation is set forth in the opinion below, Appendix A, *infra* pp. 38-40.

tigation. He testified extensively concerning his conversations with Scales and his attendance at a Party "school" in 1952 (Govt. App. 55-60; Pet. App. 14-43). But he did not testify that Scales intended to overthrow the Government by force, that Scales knew the aims of the Party to be such, or that in fact they were such.

The petitioner did not testify. For the defense, six witnesses were called, including three character witnesses.[5] Scales' mother testified to conversations in which he had denied any belief or knowledge that the Party advocates violent overthrow (Tr. 1333-34). A member of the faculty of Wesleyan University[6] testified on the nature of Marxism and Leninism, and expressed the opinion that, since 1935, the Communist Party has recognized the possibility of achieving majority political power by means of elections (Tr. 1256-57). *Cf. United States* v. *Mesarosh*, 223 F. 2d. 449, 459-66 (dissenting opinion of Judges Hastie and Maris).

The jury found Scales guilty, and the Trial Court sentenced him to be imprisoned for a term of six years (Pet. App. 3).[7] Thereafter, Scales appealed to the Court of

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[5]These comprised two members of the faculty of the University of North Carolina, and a clergyman from Chapel Hill. A fourth witness, Professor Douglas Maggs of the Duke University Law School, at which Clontz studied, contradicted Clontz' testimony concerning an alleged conversation between them with respect to Scales' legal defense (Tr. 1361-74).

[6]Professor Robert S. Cohen, a teacher of physics and philosophy, who gives courses entitled "Philosophy of American Democracy" and "Philosophy of Marxism".

[7]Inasmuch as the maximum penalty for a conviction of conspiracy to violate the Smith Act is five years, Scales' sentence is greater than has been imposed on any one else under the Smith Act. After the sentencing, Scales was held without bail (which had been fixed at $100,000 at the time of his arrest and subsequently reduced to $35,000 in cash). The order denying bail pending appeal was affirmed by a judge of the Court of Appeals of the Fourth Circuit, but on May 12, 1955, Chief Justice Warren reinstated the previous bail.

Appeals for the Fourth Circuit, on the same general grounds that are the basis of this petition.

The Court of Appeals sustained the constitutionality of the "membership clause" of the Smith Act[8] on the ground that the clause "is, of course, nothing more or less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence"[9] (Appendix A, *infra* p. 33). This conclusion is the more remarkable in that not only does the statutory provision in question make no reference to conspiracy, but this is equally true of the indictment under which Scales was tried (Pet. App. 2-3). Nor are any co-conspirators mentioned in the indictment, nor is any overt act in furtherance of conspiracy charged.[10]

The court below also rejected Scales' contention that his prosecution under the "membership clause" of the Smith Act is barred by Section 4(f) of the Internal Security Act of 1950, which provides that neither membership nor office-holding in the Communist Party shall constitute "per se" a violation of that section "or of any other criminal statute". Totally ignoring the logic and legislative history that require the application of Section 4(f) to just such a proceeding as the present one, the Court of Appeals undertook to distinguish "mere membership" from "membership with knowledge" (Appendix A, *infra* pp. 36-37). Under this

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[8]The Court of Appeals for the Fourth Circuit had already, by way of dictum, sustained the constitutionality of the "membership clause" in *Frankfeld* v. *United States*, 198 F. 2d 679, at 684 and 690. That case involved an indictment under the conspiracy statute and the other provisions of the Smith Act relating to organization and advocacy.

[9]In fact, the Smith Act does not cover conspiracy to overthrow the Government (which is prohibited by an old statute dating from the War Between the States, now 18 U. S. C. 2384), but rather, advocacy, organization of groups, and distribution of literature with the object of overthrowing the Government.

[10]On petition for rehearing, Scales pointed out that, under the theory of the Court of Appeals, he had been convicted of a crime for which he had been neither indicted nor tried. The petition for rehearing was denied by the Court of Appeals without opinion.

decision, the application of Section 4(f) would be restricted to Communist Party members who can prove that they do *not* know the Party as a group that advocates violent overthrow. Since such membership is outside any criminal statutory proscription, Section 4(f) is thus rendered meaningless surplusage.

The Court of Appeals found no merit in Scales' other contentions, based upon the insufficiency of the evidence and errors committed in the course of his indictment and trial. It affirmed the judgment of conviction on November 16, 1955, and a petition for rehearing was denied without further opinion ten days later.

Reasons for Granting the Writ

This case is the first prosecution under the "membership clause" to reach this Court. Two of the questions presented—to wit, the constitutionality of the clause and the applicability of Section 4(f) of the Internal Security Act—are necessarily inherent in any prosecution of a Communist Party member under this provision of the Smith Act. Another such conviction has just been affirmed by the Court of Appeals for the Seventh Circuit,[11] and at least seven others are pending in various federal district courts.[12] The gravity of these questions of Constitutional and federal statutory law seems beyond controversy, as does the importance of their being settled by this Court.

The evidentiary and procedural questions presented are generally similar to those that arose during the trial in the *Lightfoot* case. Equally, if not more important, however,

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[11] *United States* v. *Lightfoot*, No. 11470 in the Court of Appeals for the Seventh Circuit, judgment of conviction affirmed January 12, 1956. The opinion of the Court of Appeals for the Seventh Circuit relies heavily on the opinion in the present case.

[12] *United States* v. *Blumberg* in the Eastern District of Pennsylvania; *United States* v. *Noto* in the Western District of New York; *United States* v. *Weiss*, in the Northern District of Illinois; *United States* v. *Dennis*, No. C128/89, *United States* v. *Winter*, No. C128/98, *United States* v. *Gates*, No. C128/95, and *United States* v. *Davis*, No. C128/93, all in the Southern District of New York.

is the close relation of some of these to questions that have also arisen in several prosecutions for conspiracy to violate the advocacy and organization provisions of the Smith Act. Two such cases are presently in this Court on certiorari.[13] Alike in those two cases and the present one, important issues are raised with respect to the sufficiency of the evidence to show intentions and activities so dangerous as to bring them within the permissible ambit of legislative proscription, as bounded by the First Amendment. This Court has stated that it will review these very questions "with the scrupulous care demanded by our Constitution." *Dennis* v. *United States,* 341 U. S. 494, 516. They are as ripe for review in this case under the "membership clause" as in the conspiracy cases that are now pending here.

1. *Intrinsic Unconstitutionality of the "Membership Clause".* The petitioner is aware that it is the policy of this Court not to decide constitutional questions unless its disposition of the other issues raised in a particular case requires that the constitutional problem be confronted. *Peters* v. *Hobby,* 349 U. S. 331; *United States* v. *Rumely,* 345 U. S. 41. In the present case, there are important non-constitutional issues the disposition of which, it is believed, will in any event require reversal of the decision below. But if this Court should hold otherwise with respect to the non-constitutional questions, or should for some other reason determine to pass upon the constitutional validity of the "membership clause", then it must be held that the clause under which Scales has been convicted is invalid under the First and Fifth Amendments.

We doubt that the Government will deny that the clause restricts the rights of free speech and assembly safeguarded by the First Amendment, and in any event the matter is

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[13] *Yates* v. *United States,* 225 F. 2d 146, certiorari granted October 17, 1955, No. 308; *Mesarosh* v. *United States,* 223 F. 2d 449, certiorari granted December 12, 1955, No. 566.

foreclosed by this Court's decision in *Dennis* v. *United States, supra.* The Court's opinion specified very particularly the elements that were held to justify Congressional limitation on these rights in that case, which involved an indictment for conspiracy to advocate the violent overthrow of our Government and to organize the Communist Party as a group of persons who so advocate.

Two of the critical elements were *advocacy* and *conspiracy.* The provisions of the Smith Act involved in the *Dennis* case, declared the Court (at p. 502), are "directed at advocacy, not discussion." And in holding that those provisions as there applied satisfied the "clear and present danger" test, the Court observed (at p. 511): "It is the existence of the conspiracy which creates the danger".

But neither of these crucial factors is present in this case. Scales has not been indicted or convicted of either advocating or conspiring. The statutory provision under which he has been convicted does not contemplate that the accused be charged either with conspiring or advocating.[14] It is apparent, therefore, that the "membership clause" wholly fails to meet the criteria which, in the *Dennis* case, saved the other provisions of the Smith Act from the prohibition of the First Amendment.

Absent these elements, what is left here is wholly insufficient to satisfy the "clear and present danger" test under any meaningful application of that standard. It should be noted, furthermore, that another necessary element is lacking: that of *intent.* For the "membership clause", unlike the advocacy, distribution, and organization provisions of the Smith Act, does not even require that the accused intends to bring about, or favors, the violent over-

[14]Obviously, the "membership clause" can not be saved by simply treating it as identical with the rest of the Smith Act, as did the court below, in defiance of both the plain wording of the clause and the elementary rule that a statute is to be so construed as to give meaning to all of its provisions.

throw of government.[15] But even if that requirement were to be read into the clause, in violation of its language and logic alike,[16] its constitutionality would not thereby be saved. A state of mind comprising knowledge and intent, but which manifests itself in the external world by nothing more than non-conspiratorial membership in a group, is wholly insufficient to justify so restricted an application of the First Amendment as the punishment of such membership would require. A contrary conclusion would sweep into the discard the "clear and present danger" standard, and destroy the balance between security and freedom which the *Dennis* case and earlier decisions of this Court have sought to achieve thereunder.

Still another concept must be given weight here. No more than many others is the phrase "guilt by association" self-defining, but it is not meaningless. Its meaning is not abstruse: a man may be held criminally liable only for his own conduct, or for the conduct of others in some form of concert or combination which is recognized by our law as warranting holding an individual participant responsible for the acts of other participants. "Membership" is not such a recognized combination. Joint participation in a felony is,

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[15]It goes without saying that this defect could not be cured, as was attempted here, by adding such an allegation to the indictment. Under the language and plain meaning of the "membership clause", this allegation is sheer surplusage. *Thornhill* v. *Alabama*, 310 U. S. 88.

[16]The "distribution" paragraph of the Smith Act expressly requires an intent to overthrow the Government. The "advocacy" and "organization" paragraphs do not, but in the *Dennis* case it was held (at pp. 499-500) that the inherent nature of advocating or organizing for the violent overthrow of government is such as to require "the inclusion of intent as an element of the crime". Clearly this is not true of membership, which may be of an entirely passive nature, involving no other overt action from which intent might reasonably be inferred. Furthermore, had Congress meant to include intent as a necessary element of the "membership clause", it is most unlikely that it would have carefully specified knowledge of the group's purpose (from which intent is not logically to be inferred) as a requirement, and omitted to specify intent (from which knowledge would be logically inferrable).

and so is conspiracy. But courts and legislatures alike have remained awake to the dangers of injustice that surround imputed guilt, and have erected a variety of safeguards against oppressive consequences.

To attach criminal consequences to "membership", unaccompanied by acts or declarations that might bring the charge within the ambit of associative concepts known to our law, would so far extend the notion of imputed guilt as plainly to violate the due process clause of the Fifth Amendment and, in the circumstances of this case, the First Amendment as well.[17] The "dangers to the liberty of the individuals and the integrity of the judicial processes that are inherent in conspiracy charges" were strongly delineated by the late Justice Jackson, concurring in *Krulewitch* v. *United States*, 336 U. S. 440, at 457. But at least the dangers of the conspiracy concept are known to and limited by judicial practice. The conspirators must be identified, and the prosecution must prove an agreement among them "to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy". *United States* v. *Falcone*, 311 U. S. 205; see *The Conspiracy Dilemma*, 62 Harv. L. Rev. 276 (1948). There must be evidence of affirmative conduct by the defendant in aid of the criminal agreement among the parties. Flexible as are these requirements, they serve to a degree to specify the conspiracy charge. "Membership", on the other hand, is utterly amorphous.

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[17] John Lord O'Brian, *National Security and Individual Freedom* (1955), at p. 27-28:

> "The Smith Act of 1940 ***made it unlawful*** for any person to be or to become a member of or affiliate with any society, group, or assembly which teaches, advocates, or encourages the overthrow or destruction of any government in the United States by force or violence. These statutes, therefore, imported into our law the alien doctrine of guilt by association, which up to this time had been regarded as abhorrent and which had never been recognized either by the courts or by the Department of Justice, even during the perils and excitements of the First World War."

That there are few precedents in the Court's books merely underlines the novel character of the "membership clause". When occasion has offered, the Court has not hesitated to strike down statutes under which the degree of connection between the defendant, and the alleged criminal conduct of others, was far less tenuous than it may be under the "membership clause". *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; see also *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 402-04.

If the "membership clause" is now to be weighed in the constitutional scales, all these traditional principles manifestly require that it be held invalid under the First and Fifth Amendments.

2. *Effect of Section 4(f) of the Internal Security Act.* In any prosecution of a Communist Party member under the "membership clause", the question of the effect of Section 4(f) of the Internal Security Act of 1950 is posed *in limine*. For if Section 4(f) is given the effect that logical analysis requires and legislative history supports, it is a bar to such prosecutions. Accordingly, the indictments in this and similar cases fail to state an offense under the laws of the United States.

Section 4(f) provides that neither Communist membership nor office-holding "shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute". The court below, relying on the phrase "per se", held (Appendix A, *infra* p. 37) that Section 4(f) does not apply to Communists "who hold membership in the organization with guilty knowledge of its criminal purpose to bring about the violent overthrow of the government". Such membership is not "mere" (i.e.

"per se"; but "with knowledge", and this added element removes it from the scope of Section 4(f).[18]

The effect of this construction, obviously, is to limit Section 4(f) to Communists who do *not* have the stipulated knowledge. But this is wholly incompatible with the structure and purpose of the Internal Security Act in general and Section 4(f) in particular.

Section 2 of the Internal Security Act (50 U. S. C. 781) embodies a "Congressional finding of necessity" in which "Congress finds" that (paragraphs 6 and 15) the Communist movement in the United States, including Communist organizations that "designate themselves as political parties", is "an organization . . . rigidly and ruthlessly disciplined . . . seeking to advance a moment when . . . overthrow of the Government of the United States by force and violence may seem possible of achievement . . ." in order to set up a "Communist totalitarian dictatorship" which will be "subservient" to other such dictatorships. There is no doubt, in the light of this finding, that Congress in enacting the Internal Security Act regarded the Communist Party as a group of persons who advocate and encourage the violent overthrow of our Government, such as is described in the Smith Act.

Section 4(a) of the Internal Security Act makes it a crime "knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship . . . under the domination or control of any foreign government . . . organization . . .

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[18]The Court of Appeals also relied (Appendix A, *infra* p. 37) on Section 17 of the Internal Security Act (50 U. S. C. 796), which provides that: "The foregoing provisions of this subchapter shall be construed as being in addition to and not in modification of existing criminal statutes". On familiar principles of construction, however, this general provision does not override the specific reference in Section 4(f) to "any other criminal statute". *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204.

or . . . individual". Sections 7 and 8 of the Act (50 U. S. C. 786-87) provide for compulsory registration, under severe criminal penalties for failure, of Communist organizations and members. Especially in view of the "Congressional finding" in Section 2, it is obvious that the registration provisions raise serious questions of self-incrimination for Communist members under Section 4(a). It was in order to deal with this problem that subsection (f) was added to Section 4, as the legislative history indisputably shows.[19]

Now, it is perfectly clear that, whatever may be held to be the legal effect of Section 4(f), its purpose would be entirely frustrated by confining its scope in accordance with the decision below in this case. For the lower court's construction would exclude from its coverage all Communists who know the objectives of the Communist organization to which they belong, as found by Congress in Section 2 of the Act. It would thus be an inevitable consequence of the decision below that Communists who know the Congressionally-found purposes of their organization are given no immunity under Section 4(f) and could plead the privilege against self-incrimination to avoid compliance with the registration provisions, which thus would be binding only on Communists who do *not* know their organization's purposes.

In short, the construction adopted below turns the entire statute into an absurdity. Plainly, membership "per se" means membership without other criminally significant acts or declarations, not membership without knowledge of the

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[19]The original Senate bill (S. 2311, 81st Cong., 1st Sess.) did not contain an immunity provision. The late John W. Davis raised the question of self-incrimination under Section 4(a) in a letter to the Senate Committee (Sen. Rep. No. 1365, 81st Cong., 2nd Sess., pp. 43-44). As a result of the Davis and other letters the Senate Committee added Section 4(f), providing that neither Communist membership nor office-holding should constitute a violation of Sections 4(a) or 4(c), the second of which proscribes the knowing receipt of classified information by Communist officers and members.

purposes of the group. No other interpretation accords with common sense and the plain purpose of the provision.[20]

Furthermore, the legislative history of Section 4(f)—ignored by the court below—shows that Congress specifically intended to protect Communist members and officers against ~~persecution~~ under the membership clause of the Smith Act. As reported out by the Senate Committee, Section 4(f) related only to prosecutions under Sections 4(a) and 4(c) of the Internal Security Act. On the floor of the House of Representatives, this formulation was criticized by Representative Celler as inadequate, in that the protection was not extended to the membership clause of the Smith Act (96 Cong. Rec. 13739).[21] *Thereafter* the House adopted the amendment adding the words "or of any other criminal statute" (96 Cong. Rec. 13761), which was later included in the conference report and became part of the Act as passed into law.

Perhaps to say more is to heap Ossa on Pelion. At this risk, it may be added that in 1954 Congress, during the debates on the bill that became the Communist Control Act of 1954 (50 U. S. C. 841-844), again manifested its understanding that Section 4(f) of the Internal Security Act bars the prosecution of Communists for membership with knowledge. To the original bill (S. 3706, 83rd Cong. 2nd Sess.), Senator Humphrey offered an amendment containing a Congressional finding (parallel to that in Section 2 of

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[20] *Cf. United States* v. *Ginn*, 222 F. 2d 289, at 290-91. It should also be noted that both Sections 4(a) and 4(c) make knowledge an element of the crimes they proscribe, so that if Section 4(f) were construed to cover only membership without knowledge, it would be operative only with respect to persons who would not in any event be liable under Sections 4(a) and 4(c). This applies equally to the membership clause of the Smith Act, which punishes membership only if accompanied by knowledge, so that the phrase "of any other criminal statute" would likewise be robbed of all operative effect.

[21] The same point was made in the Senate Committee minority report (Sen. Rep. No. 2369, Part 2, 81st Cong. 2nd Sess., pp. 12-13) and in the debate on the Senate floor by Senators Kefauver and Humphrey (96 Cong. Rec. 14479, 15198).

the Internal Security Act) that the Communist Party aims to overthrow the Government by force and violence, and a criminal proscription of membership in the Communist Party with knowledge of its purposes. 100 Cong. Rec. 13557-58. This, of course, was substantially the same as the "membership clause" of the Smith Act.[22]

Had the penal provisions of the Humphrey amendment been enacted, they might have operated as a *pro tanto* repeal or modification of Section 4(f) of the Internal Security Act—i.e., they might have reinstated the liability of Communists to prosecution for membership with knowledge under the new legislation *or* under the membership clause of the Smith Act. This, in turn, would have greatly fortified the plea of self-incrimination by Communist Party members under the registration provisions of the Internal Security Act—the very eventuality which it was the purpose of Section 4(f) to avoid. In short, Congress confronted in 1954 the identical problem it had confronted in 1950.

And so, as a result of representations from the Attorney-General and objections from many Senators and Representatives (*e.g.* 100 Cong. Rec. 13836, 13956, 14041) the criminal sanctions for membership were stricken from the Humphrey Amendment, and thus Section 4(f) of the Internal Security Act was left intact and operative to bar the prosecution of Communists for mere membership with knowledge, whether under that Act, the membership clause of the Smith Act,[23] or "any other criminal statute".

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[22]The principal difference, irrelevant here, was that, since the Communist Party was specifically named in the Humphrey Amendment, presumably no proof of its violent purposes would have been required.

[23]In *United States* v. *Yates*, *supra*, the court remarked (at p. 153) that Section 4(f) "made a change in the law previously", apparently referring to the Smith Act. This observation is in conflict with the view of the court below (Appendix A, *infra*, p. 37) that Section 4(f) effected "no modification of the provisions of the Smith Act." *Cf. United States* v. *Mesarosh*, *supra*, at p. 452.

Accordingly, the indictment does not charge the petitioner with any offense under the laws of the United States, and the judgment below must be reversed.

3. *Sufficiency of the Evidence.* In affirming the convictions of the defendants in the *Dennis* case, the only Smith Act proceeding that has as yet been reviewed here, this Court stated (at p. 516): "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution." In accordance with this declaration, the Court has recently undertaken to review two cases (*Yates* and *Mesarosh*, *supra*) where such doubts have been raised. They are raised even more sharply in the case of Scales.

Intent, activities, and power of evil must be gauged by reference to the indictment and the evidence. The sufficiency of these is a Constitutional as well as a statutory question. It is Constitutional because, under the rule in the *Dennis* case, the Smith Act's impingement on the First Amendment is warranted only in cases where the evidence sufficiently establishes intent, activities, and power of evil that constitute a "clear and present danger". Reexamination and particularization of the *Dennis* rule is urgently required for the guidance of the lower federal courts in their disposition of the numerous Smith Act prosecutions that are pending.[24]

Whatever difficulties and close questions the evidence may present in other Smith Act cases, there are few here. No conspiracy has been charged and proved, nor has any advocacy or incitement. To be sure, no such charge or proof is required under the "membership clause", but this circumstance does not enhance the sufficiency of the evidence for First Amendment purposes.

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[24] In addition to the "membership" cases listed *supra*, note 12, and the two conspiracy cases pending here on certiorari, there are at least eight conspiracy cases pending in the several federal courts of appeals, and three conspiracy trials are pending in the federal district courts (Connecticut, Ohio, and Porto Rico).

Furthermore, the evidence with respect to Scales' knowledge (required by the clause) and intent (not required by the clause but Constitutionally necessary) is so stale and sparse as to be plainly insufficient for either Constitutional or statutory purposes. The only testimony relating to any declaration by the defendant or in his presence, wherein overthrow of the Government by force is directly adverted to, concerns a conversation (Appendix A, *infra*, pp. 38-40) in December, 1948—nearly six years before indictment and three before the limitations period—under circumstances casting such doubt on the credibility of the testimony[25] that it can not possibly support the judgment of conviction. The testimony of the single prosecution witness, Childs (Pet. App. 14-43, Govt. App. 55-60), who participated with Scales in Party affairs during the limitations period, concerns activities that are highly controversial and declarations that are certainly anathema to most Americans, but contains nothing that could possibly support Scales' conviction under the Smith Act.

In the upshot, the prosecution's case amounted to little more than Lautner's testimony about the aims of the Party (none of which was connected with Scales) and that of Clontz and Childs about Party activities and declarations in North Carolina which the jury no doubt found incomprehensible and repugnant, but which were not shown to be unlawful or directed to unlawful ends. There was little to support the verdict other than inferences that might be drawn from Scales' Party membership and office-holding, and these are not sufficient under the Constitution or the

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[25] Scales' alleged statements were said to have been made during his second meeting, and first conversation about the aims of the Party (Tr. 825-26), with Clontz, an observer for the Federal Bureau of Investigation. Although Clontz saw Scales frequently for the next two years and joined the Party in 1950, he testified to no subsequent declarations of this sort. Assuming that Scales harbored a predilection for violent overthrow, it is most unlikely that he would have revealed it to Clontz as almost a complete stranger in 1948, but never to him as a fellow Party member thereafter.

Smith Act as expounded in the *Dennis* case. As was observed by Justice Reed, dissenting in *Bridges* v. *United States*, 346 U. S. 209, at 234, "there is no necessary identity in law between Communist Party members and such persons" (referring to persons debarred from naturalization for advocacy of the violent overthrow of Government).

Finally, the prosecution's evidence in this case with respect to the aims and purposes of the Communist Party falls far short of the standards of proof applied in courts of law. Whatever one's personal views on this subject may be, when the Government brings a charge against a Communist under the Smith Act, the charge must be proved.

The Government's principal witness in this matter, Lautner, left the Party in January, 1950, almost two years before the statutory period covered by the indictment. In the conspiracy cases under the Smith Act, testimony antedating the limitations period has been admitted on the theory of a continuing state of facts, but it has never been held sufficient *standing alone* to support the ultimate conclusion.[26]

Taken at face value, Lautner's testimony on the crucial issue of advocacy of force and violence was reduced on cross-examination to an expression of personal opinion that the Party advocates forceful overthrow, despite contrary statements by various Party officials and in Party publications (Tr. 498-99, 511-12). This witness, who frequently takes the stand for the Government in Smith Act and other cases where the nature of the the Party is an issue, also testified in the *Mesarosh* case, *supra*. Judge Hastie, dissenting,[27] concluded that (223 F. 2d 449, at 463-64):

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[26] As strongly indicating the contrary, see *United States* v. *Dennis*, 183 F. 2d 201, 231: "It is *toto coelo* a different question whether we are treating them [circumstances prior to the statutory period] as *media concludendi*, or as the *factum* itself". See also *United States* v. *Lustig*, 16 F. R. D. 378, 379: "It cannot be said with any degree of certainty that the aims and objectives of the Communist Party over a period of many years were identical".

[27] Judge Maris concurred in Judge Hastie's opinion.

"... Lautner's opinion was given merely in terms of a generalized revolutionary goal of the Communist group. ...

"Lautner did not point to a single thing indicating that the 1945 program contemplated, beyond inculcation of belief in and approval of an ultimate revolution, teaching that the time had now come to work for the overthrow of the existing government as soon as possible. ...

"If Lautner did not indicate any proximity of the violence against government said to be contemplated by the 1945 program, I have not found such evidence elsewhere in the record."

It is on the basis of such slender evidence of Party aims, and without any proof of violent intentions, or knowledge of or participation in unlawful activities, that Scales has been convicted and sentenced to prison for six years. If the evidentiary standards announced in the *Dennis* case are to retain any practical significance, this judgment must be reversed.

4. *Prejudicial Errors in the Course of the Indictment and Trial.* Petitioner's indictment and trial were vitiated by numerous prejudicial errors, of which four are of such general importance as to warrant review and correction by this Court.

(A) The grand jury was illegally impanelled. Prior to the trial, petitioner filed a motion challenging the grand jury panel which returned the indictment.[28] The hearing showed that the method for securing names for the panel was that the clerks and jury commissioner requested various individuals[29] to provide the names of persons who were

[28]Reference is made in this section 4(A) of the petition to the separately paginated transcript of the preliminary proceedings on motions in the District Court. These are designated "Mot. Tr,".

[29]Among those solicited were local sheriffs, superintendents of public schools, bank presidents and the Chairmen of the Republican and Democratic parties in the counties in the District.

"suitable . . . for jury service" (Mot. Tr. 18-24). The only information received by the jury commission concerning these prospective jurors was their names and addresses. No questionnaires were ever sent to the members of the jury panel prior to placing their names in the box, nor were the individuals who were asked to supply names for jury service ever informed of the qualifications for jurors (Mot. Tr. 34-36).

This method of selecting jurors is an illegal delegation of the clerk's and jury commissioner's duties. *Glasser* v. *United States*, 315 U. S. 60; *United States* v. *Murphy*, 224 Fed. 554. It also results in a jury panel that is not a fair cross-section of the community. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217. The applicable statute (28 U. S. C. 1864) provides that: "The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing." Here, there is no way of showing whether or not the names of three hundred qualified persons are in the jury box, since the jury commission knew only the names and addresses of the potential jurors.[30]

The method of impanelling the jury in this case has prejudiced the defendant and worked harm to the jury system and the processes of our courts. *Ballard* v. *United States*, 329 U. S. 187, 195. This Court, in the exercise of its responsibility to supervise the administration of justice in the federal courts, should dismiss the indictment.

(B) The "Congressional findings" in the Communist Control Act of 1954 (50 U. S. C. 841) and the Internal

[30]In a similar case in the District Court of Connecticut, a challenge to the grand jury panel was upheld and the indictment dismissed. *United States* v. *Silverman*, 129 F. Supp. 496. The court held (at p. 511): "The failure of the jury commission to have determined that there were at least three hundred qualified names in the box at the time of the drawing of the grand jury . . . was a breach of the affirmative statutory duty imposed upon the commission and is fatal to the indictment . . .".

Security Act of 1950 (50 U. S. C. 781) deprived the petitioner of the opportunity for a fair and impartial trial. The findings in the latter statute have already been described.[31] The former finds that the Communist Party "is in fact an instrumentality of a conspiracy to overthrow the government of the United States" and is dedicated "to the proposition that the present constitutional government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence".

The indictment here charges and the Government offered proof that the Communist Party advocates the violent overthrow of the government. On this issue of fact, the defendant was entitled to a fair trial, before a jury able to reach an independent, objective and impartial verdict on the evidence. *Cf. Moore* v. *Dempsey*, 261 U. S. 86; *Frank* v. *Mangum*, 237 U. S. 309; *Manley* v. *Georgia*, 279 U. S. 1. For the jury here to find that the Communist Party does not advocate the violent overthrow of the government, it would have had to flout the Congressional finding.

In the face of this Congressional finding, it was impossible for the jury to determine the question of violent overthrow on the basis of an independent, objective and impartial viewing of the evidence. *Cf. Delaney* v. *United States*, 199 F. 2d 107.

(C) The trial court erred in denying the defendant's request, under Rule 17(c) of the Federal Rules of Criminal Procedure, to examine the written statements previously furnished to the Federal Bureau of Investigation by the prosecution witnesses Clontz and Childs. Instead, the trial judge examined these statements *in camera* to determine whether there were any inconsistencies between the reports and the testimony, but stated that he would not consider an

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[31] *Supra*, p. 13.

omission as an inconsistency (Tr. 1161). The judge found no inconsistency.

This procedure was plainly prejudicial to the defendant, and conflicts with this Court's decision in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214. See also *Fryer* v. *United States*, 207 F. 2d 134; *United States* v. *Bryson*, 16 F. R. D. 431; *United States* v. *Schneiderman*, 106 F. Supp. 731.[32]

(D) There was highly prejudicial error in the admission at the trial of incompetent, irrelevant, remote and inflammatory testimony. The court admitted a large volume of inflammatory evidence concerning teachings of the Communist Party that bore no reasonable relation to the issue of force and violence. Such matters included the Party's attitude toward the Negro and his status in the South (Govt. App. 32-33 and 37; Pet. App. 26-28 and 41) and toward the war in Korea (Pet. App. 29 and 33). Furthermore, prosecution witnesses were permitted to describe incidents that bore in no way on the issues, but were extremely prejudicial in their general effect. Clontz, for example, was permitted to testify in detail about the circumstances surrounding an appearance at the University of North Carolina by John Gates, editor of the Communist publication *Daily Worker* (Tr. 596-97 and 1433).

Even more serious was the trial court's admission of extensive testimony by Lautner and Clontz concerning acts and declarations of third persons that did not take place in Scales' presence. The competence and relevance of any of

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[32] In *United States* v. *Lebron*, 222 F. 2d 531, the Court of Appeals for the Second Circuit upheld the trial court's refusal to allow the defendant to examine such statements, after he had read them and found nothing inconsistent. But it was required that the statements be sealed and made a permanent part of the record, so that the appellate court could itself determine whether there were any inconsistencies.

this third-party testimony is dubious at best,[38] inasmuch as the governing issue was Scales' knowledge of the Party's aims, and evidence of other persons' acts or declarations bearing on that issue would be competent only if shown to be in the presence or range of perception of the accused.

However that may be, the incompetence and prejudicial remoteness of a great deal of the third-party testimony is indisputable. For example, Clontz was permitted over objection to testify about his experience at the Jefferson School in New York City (Tr. 656-65), hundreds of miles from Scales in North Carolina. Lautner testified extensively about declarations and publications of third parties at New York and other places utterly remote from Scales and his sphere of activities.

All of this served no purpose germane to the issues, but its inevitable effect was to excite animosity against Scales and inflame the jurors' emotions. By the erroneous admission of such testimony, petitioner was deprived of a fair and impartial trial, and his conviction must be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

TELFORD TAYLOR
New York, N. Y.

January, 1956.

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[38]The court below justified the admission of this evidence by separating the factual issue of the Party's aims from the issue of Scales' knowledge of those aims. Such a theory might be valid in dealing with a precisely determinable issue of physical fact (such as whether the victim of a murder was or was not over six feet tall), but is highly questionable in its application to the issue of an accused's knowledge of the aims of the members of a group.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7016.

JUNIUS IRVING SCALES, *Appellant,*

versus

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO.

(Argued October 4, 1955. Decided November 7, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

David Rein for Appellant, and Edwin M. Stanley, United States Attorney, and Kevin T. Maroney, Attorney, Department of Justice, (William F. Tompkins, Assistant United States Attorney, John H. Davitt and William G. Hundley, Attorneys, Department of Justice, on Brief) for Appellee.

PARKER, Chief Judge:

This is an appeal in a criminal case by a defendant who has been convicted of violation of section 2 of the Smith Act of June 28, 1940, 54 Stat. 670, 671, 18 USCA 2385.

That section, as brought forward in the United States Code, is as follows:

> "Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
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> "Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> "Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—
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> "Shall be fined not more than $10,000 or imprisoned not more than ten years or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

The indictment, which was returned on November 18, 1954, charged that the Communist Party of the United

States of America has at all times been "a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit" and that the defendant Scales "had been a member of said Communist Party from January 1946 up to the filing of the indictment well knowing during all of said period that said Communist Party of the United States of America was and is a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, and said defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit."

The evidence in the record amply sustained the charge in the indictment. There was evidence, similar to that in *Dennis* v. *United States,* 2 Cir. 183 F. 2d 201, 341 U. S. 494, and *Frankfeld* v. *United States,* 4 Cir. 198 F. 2d 679, to the effect that the Communist Party advocates the overthrow of the Government of the United States by force and violence. It was admitted that defendant Scales was a member of the party during the period covered by the indictment and was chairman of the North and South Carolina District of the party; and there was ample evidence that he knew of its purpose to overthrow the government by force and violence, that he approved of that purpose and that he had so expressed himself to witnesses who testified on the trial.

The case was submitted to the jury in a charge which clearly excluded any possibility of "guilt by association". The jury was expressly instructed that, before there could be a conviction of defendant, four things must be proved beyond a reasonable doubt: (1) That the Communist Party of the United States was a group teaching or advocating

the destruction or overthrow of the Government of the United States by force and violence, (2) that the defendant was a member of the party, (3) that, while a member of the party, he well knew of its teachings and purposes and (4) that he himself intended to bring about the overthrow of the Government of the United States by force and violence. In addition to this the trial judge carefully explained that the defendant could not be convicted merely because he was a member of the Communist Party but only upon a finding that he knew of and participated in the purpose of the party to overthrow the government by force and violence, saying:

> "First, it is not criminal for any person or group to hold or express the belief that the Government of the United States should be completely changed. It is not criminal for any person or group to have such a change of government as a purpose or aim. It is not criminal to publicly advocate and urge such a change by peaceable and constitutional means. It is not criminal to criticize the Government and its policies, foreign and domestic, or to praise the policies of other governments, and this is true regardless of whether you agree or disagree with the truth or falsity of such criticism or praise. Nor is it criminal for the Communist Party or anyone else to teach that should a change in our form of government be made and accomplished by peaceable and constitutional means, and thereafter the new government should be resisted by force and violence, then the new government would be justified in using force and violence to subdue such resistance; that is, if the change had been made by peaceful and constitutional means, the new government would have the right to protect itself against any other change save by peaceful, constitutional means.

"You cannot convict the defendant merely because he was a member or an officer of the Communist Party, no matter what were the principles and teachings of the Party; for membership alone is not a crime. Moreover, the teaching in the abstract, or teaching objectively, that is, teaching, discussing, explaining or expounding, what is meant by the aim or purpose of any group or society of overthrowing the Government by force and violence, is not criminal. For example, study and discussion by the Communist Party or in school classrooms, or study groups, or public meetings, with the object of informing the participants or the audience of such aims and purposes of the doctrines of Marx, Lenin or Stalin, is entirely lawful. But it is criminal to advocate or urge the overthrow by force or violence of the Government at the opportune time. * * *.

"It is in this understanding, and in this understanding only, that you must determine whether the evidence shows beyond a reasonable doubt that the Communist Party of the United States of America was a group or society teaching and advocating the overthrow and destruction of the Government by force and violence as soon as permitted. If you are not convinced beyond a reasonable doubt that the Communist Party of the United States was such a group, that is, a group that urged and advocated the overthrow, then you can not find the defendant guilty and should acquit him without consideration of the remainder of the elements of the crime.

"But, on the other hand, if you believe beyond a reasonable doubt that the Communist Party was such a group, then you should next consider whether the defendant, Scales, was a member or affiliated with the

Party and the Court tells you, by the way, that that is admitted; he admits that he was a member of the Party. You must consider, secondly, whether he had knowledge of the aims and purposes of this Party, and, thirdly, whether on his part, he specifically intended to accomplish the overthrow of the Government by force and violence as soon as practicable.

"To emphasize those points: To be punishable, the membership must have been within the period of November 18, 1951, to November 18, 1954. Earlier membership would not be covered by this indictment. It is barred, as not punishable, by the Statute of Limitations.

"Knowledge by the defendant of the Party purposes must accompany the membership in order for the membership to be criminal, and that knowledge too must have existed during the three-year period.

"And a specific intent, as I have already indicated to you, on the part of the accused to bring about the overthrow of the Government is also necessary and an indispensable requisite of the offense. Again, the intent must have existed during the three-year period.

* * * *

"If you have found beyond a reasonable doubt that the Communist Party of the United States was a group or society teaching or advocating the overthrow of the Government by force and violence at the propitious time, but you are not convinced beyond a reasonable doubt that the defendant knew of its purposes, or you are not convinced that he himself had the intent to accomplish that purpose, then you must find him not guilty, because those elements are just as indispensable to the offense as the aims and purpose of the Communist Party."

The principal contentions of defendant upon this appeal are: (1) that the act under which he is indicted is unconstitutional and void; (2) that prosecution of the offense charged is barred by section 4(f) of the Internal Security Act 50 USC 783(f); and (3) that the court erred in admitting and allowing the jury to consider evidence tending to show the purpose of the Communist Party to overthrow the government by force and violence, where such evidence did not consist of statements made by defendant or in his presence or related to matters occurring prior to the three year limitation period preceding the finding of the bill of indictment. Other points of minor importance are raised relating to the regularity and fairness of the trial which have been duly considered and which will be referred to after we have dealt with these three principal questions.

1. *The Constitutionality of the Statute.*

The portion of the statute here applicable is the third paragraph of section 2385 of Title 18 of the United States Code, quoted above, relating to membership in a group advocating the overthrow of the government by force and violence by one who becomes or remains a member thereof knowing of its criminal purposes. In the light of the decisions in the Dennis and Frankfeld cases, supra, we think there can be no doubt as to the constitutionality of this provision of the statute. It is said that those cases related to conspiracy; but the conspiracy charged was conspiracy to violate the statute and the validity of its provisions was necessarily involved and was expressly passed upon in the light of the same arguments relating to "guilt by association" and "clear and present danger" that are made here. In the Frankfeld case we said (198 F. 2d at 683-684):

> "Defendants argue that, even though the Smith Act be not unconstitutional in its entirety, the 'membership' and 'literature' provisions of the act must be

held invalid and that this invalidates their conviction, since violation of these provisions was charged as being among the objects of the conspiracy. What was said by the Supreme Court in the Dennis case, is a sufficient answer to this argument. There is no distinction in principal between advocating through the printing and distribution of literature the destruction or overthrow of the government and advocating it by word of mouth. So far as 'membership' in an organization advocating such destruction or overthrow is concerned, such membership is condemned only where there is knowledge on the part of the accused of the unlawful purpose of the organization. Membership in an organization renders aid and encouragement to the organization; and when membership is accepted or retained with knowledge that the organization is engaged in an unlawful purpose, the one accepting or retaining membership with such knowledge makes himself a party to the unlawful enterprise in which it is engaged. Certainly it is within the power of Congress to forbid the circulation of literature advocating the forcible overthrow or destruction of the government or membership in an organization having such destruction as its purpose, where there is knowledge of such purpose on the part of one accepting or retaining such membership.

"The defendants contend that these provisions of the statute are unconstitutional because they do not require a 'clear and present danger' as a condition of criminality; but it would be little short of absurd for a statute to forbid advocacy of the destruction of the government or membership in an organization formed for the purpose of such advocacy only in the event that they result in 'clear and present danger'.

> This would be to make the near success of an attempted crime the criterion of criminality for making the attempt."

The membership clause of the statute is, of course, nothing more or less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence. It is elementary that a conspiracy is a partnership in criminal purposes and that all are guilty who join it with knowledge of such purposes; and all that the statute does is apply this fundamental concept of conspiracy to an organization having for its purpose the forcible overthrow of the government. This was considered in the Frankfeld case, where we said (198 F. 2d 689): "If it be argued that the crime defined by section 2(3) is in essence the crime of conspiracy, the position of the defendants is not helped; for the result would be merely that such conspiracy is thus made criminal by two sections of the act." As the effect of the membership clause is to define as well as make criminal a conspiracy to overthrow the government, all that was said in the Dennis and Frankfeld cases as to the validity of the statute is pertinent here. In the Frankfeld case we said (198 F. 2d 682):

> "The question presented is not one as to freedom of speech or as to the right to organize for proper political purposes, but goes to the power of the government to outlaw and punish conspiracies whose purpose it is to overthrow the government itself by force and violence. Modern history is replete with instances of the danger to the government inherent in such conspiracies; and there is nothing in the Constitution or in any sound political theory which forbids it to take effective action against that danger. If it may take action to protect itself from being overthrown by force and violence, it necessarily follows that it may

forbid conspiracies having that end in view and may punish such conspiracies as criminal. In the absence of conspiracy the 'clear and present danger' rule may furnish a satisfactory criterion of criminality in the case of ordinary speeches advocating force and violence; but such rule has no practical application to advocacy of violence in connection with conspiracies to overthrow the government, for the danger of such conspiracies is ever 'clear and present'. They are pregnant with potential evil, which, while hidden from view in normal times, is likely to assert itself as an irresistible force when some national crisis presents an opportunity for a putsch or a coup d' etat."

In the Dennis case, the late Chief Justice Vinson, speaking for the Supreme Court, answered in the following language the argument that the statute must be held invalid in application of the "clear and present danger" rule:

"Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of

inadequate numbers or power of the revolutionist, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. * * *

"Likewise, we are in accord with the court below, which affirmed the trial court's finding that the requisite danger existed. The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled wtih the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger. Cf. *Pinkerton* v. *United States*, 1946, 328 U. S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489; *Goldman* v. *United States*, 1918, 245 U. S. 474, 38 S. Ct. 166, 62 L. Ed. 410; *United States* v. *Rabinowich*, 1915, 238 U. S. 78, 35 S. Ct. 682, 59 L. Ed. 1211. If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added."

In his concurring opinion in the Dennis case, the late Mr. Justice Jackson pithily observed:

> "But it is not forbidden to put down force or violence, it is not forbidden to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose.
>
> * * * *
>
> "There is no constitutional right to 'gang up' on the Government."

"Guilt by association" is not punished by the statute; for knowledge of the criminal purpose of the organization is made a condition of guilt in joining it. The "clear and present danger" rule has no application to the statute, since what it denounces is a conspiracy to overthrow the government by violence; and Congress may unquestionably forbid incitement to crime and organization for that purpose and may make such organization criminal, irrespective of the immediacy of the danger resulting from such organization.

2. *Effect of the Internal Security Act.*

Defendant relies upon section 4(f) of the Internal Security Act otherwise known as the Subversive Activities Control Act of 1950, 61 Stat. 987, 991, 50 USC 783(f), which provides: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." The purpose of this provision, as defendant correctly argues, was to insure the enforceability of the registration provisions of the act by making the privilege against self incrimination unavailable as a defense to failure to register. The language of the section relied on, however, provides merely that neither holding of office nor membership in a Communist organization shall constitute per se a violation

of a criminal statute. It does not purport to exempt from criminal liability membership in an organization advocating the overthrow of the government by force and violence where such membership is acquired or held with knowledge of the criminal purpose in which the organization is engaged. In other words, mere membership in the party is not a crime. Membership with knowledge of the criminal purpose of the organization remains a crime.

Whether the effect of the language used is to make the privilege against self incrimination unavailable to those who fail to register as required by the act, we need not stop to inquire. It is clear that the language used does not exempt from criminal prosecution members of the Communist party who hold membership in the organization with guilty knowledge of its criminal purpose to bring about the violent overthrow of the government. Even though the Communist Party has such purpose, membership per se is not made a crime under the Smith Act; and it is only membership per se, which is exempted from criminal prosecution under section 4(f) of the Internal Security Act. That no modification of the provisions of the Smith Act was intended by Congress in the passage of the Internal Security Act of 1950 is made abundantly clear by section 17 of the Internal Security Act, 64 Stat. 1003, 50 USC 795, which provides: "The foregoing provisions of this title shall be in addition to and not in modification of existing criminal statutes". In view of this interpretation which Congress itself placed on the statute at the time of its passage, there is no occasion for further discussion as to its effect upon the Smith Act. The charge of the court, heretofore quoted, made it clear that defendant could not be convicted because of mere membership in the party.

3. *The Evidentiary Questions.*

Defendant complains that the trial judge admitted and allowed the jury to consider evidence relating to the aims

and purposes of the Communist Party by documents and teachings with which he was not connected, that some of this related to aims and purposes other than the use of force and violence and that a considerable part of it related to publications and teachings prior to the three year limitation period preceding the finding of the indictment. We think that this complaint is entirely without merit. The evidence as to the teachings carried on by the party and the documents used in the teaching was clearly competent to show the aims and purposes of the party; that which related to infiltration, subversion and the arousing of dissension had a direct bearing on the purpose to overthrow the government by force and violence when a favorable opportunity should present itself; and the fact that some of the evidence related to the period preceding the limitation period was no objection to its admissibility, since there was no evidence of any change in the aims and purposes of the party in the meantime and the evidence introduced clearly indicated that there had been no such change. Of course, the defendant could not be convicted unless he was shown to have had knowledge of its aims and purposes and the jury was clearly so instructed; but there was ample evidence to estabish such knowledge on his part. Aside from the fact that he was chairman of the party in North and South Carolina and on account of his position is reasonably presumed to have known its aims and purposes, there is direct evidence that he did have such knowledge. Thus, in a conversation with the witness Clontz, when Clontz, after reading the communist literature advocating revolution which defendant had furnished him, inquired whether communism could not be brought to the people of the United States through a process of education, defendant replied in the negative and said that the use of force was the only answer. Clontz's testimony with respect to this conversation is as follows:

> "Additionally then I posed to Scales the question, If you can have a publishing company and if Commu-

nism is the better form of government and the better way of life, why can't we bring Communism here to the United States by educating the people, by showing them that this is the best form of government?

"Scales answered me that was entirely fallacious, that that would never work, that in the first place the Government of the United States owned all the media of communication, the newspapers, . . . the—I don't believe he mentioned television—but the newspapers and radio and other similar mediums; they controlled the schools, the other institutions of Government and that they would not permit the masses of people to learn the truth about this Communism, that in order to get the truth to the people you would first have to destroy the Government and destroy the mediums of communication control and destroy the institutions of Government, that Stalin and his followers had proved conclusively that ideas alone would never change the form of government or would never do anything. He said that it would be nice if revolution happened automatically but, he said, that unfortunately they didn't, that a small militant force had to bring about a change in government by revolution.

"I recall he said that that is where we, the Communist Party, come in. He said that Engels, the philosopher of some kind, that collaborated with Karl Marx, had felt that when the revolution comes about, Government would just disintegrate and the people would just sort of run things very loosely. He said that Lenin had proved that that didn't follow, that when the revolution took place in the Soviet Union in Russia, that Lenin had taken the

police power, that the Czar had used that police power to consolidate his position and as Junius put it, to protect the masses of the people from the encroachment of the foreign capitalist countries that would try to come in and prevent the revolution.

"Scales said, and it made quite an impression on me, that force is the only answer, that ideas alone can never accomplish anything.

"That was the substance of our conversation at that time."

In a later conversation with Clontz on the subject of what aid could be expected from the Soviet Union in case of revolution, defendant said, according to Clontz's testimony:

"I recall during one of these meetings in the spring of 1950 Scales brought up the question of permanent revolution. Permanent revolution was defined by Scales as the concept that the Soviet Union and the Communist Party in the Soviet Union were not through with their job after they had achieved Socialism. In the Soviet Union they had a continuing obligation. He said that when the Soviet Union Communist Party had brought about a revolution and had brought Socialism there to the Soviet Union, they still were obligated under Stalin's teachings and under common sense, as he put it, to continue assisting the Communist Party all over the world until they had overthrown the capitalist governments including that of the United States that would threaten Communists, Communism and Socialism, unless they were overthrown.

"Now I asked Scales, Does that mean that when the day of the revolution comes, Soviet Union is going to land troops?

"Scales' answer to that was that as a practical matter the Soviet Union would not land troops at the commencement of the revolution, that the Communists here in the United States would have to start the revolution themselves. He pointed out that the Communist Party in the Soviet Union had learned through experience in China that direct Soviet Union guidance immediately in the form of leadership was not desirable. He said they sent a general over to China during the time the Chinese Revolution was taking place, and this Russian General that was sent over by the Communist Party resulted in having the troops completely routed, that Mao, the Chinese leader there in China had never been to the Soviet Union in his life at that period of time in 1950, but that instead the Soviet Union had sent political advisors over to educate him in the proper Communist technique, and had furnished them assistance through their military advisers and that sort of thing. He said that once the revolution was started, if it began to look as though the police power of this country would be used against the working class in the Communist Party, then certainly the 'mother country' as he called the Soviet Union, could not stand by and see that happen but would have to land troops to protect us."

Defendant did not take the stand to deny either of these statements or to testify to any change of views on his part. Standing uncontradicted, they clearly established knowledge by defendant of the unlawful purposes of the party within the limitation period as well as prior thereto, since the running of the statute of limitations cannot empty a man's mind of knowledge of this sort. When defendant remained chairman of the party in the North and South Carolina district during the limitation period, he did so

with clear knowledge of its purposes, as revealed in these conversations. Added to this is the testimony of Clontz that in December 1951, within the limitation period defendant informed him that he, the defendant, was going "underground" and that, on the orders of the party, Clontz was not to use the telephone, the telegraph or the mails in communication with him.

It was not necessary to his guilt that the defendant take part in the teaching or have a hand in the preparation of the documents of the Communist Party or even that he be shown to be familiar with the documents. All that it was necessary to show was that the party did advocate the overthrow of the government by force and violence and that he became or remained a member during the period not barred by the statute of limitations with knowledge of that unlawful purpose. The evidence objected to on the ground that it was res enter alois acta was clearly competent to establish the unlawful aims and purpose of the party. With respect to that which showed knowledge prior to the statute of limitations, this was clearly competent as scienter and intent were elements of the offense. See *United States* v. *Mesarosh* 3 Cir. 223 F. 2d 449; *United States* v. *Schneiderman* 106 F. Supp. 892, 897. There can be no question but that the evidence objected to is competent in a conspiracy case. See *United States* v. *Flynn*, 2 Cir., 216 F. 2d 354; *Short* v. *United States* 4 Cir. 91 F. 2d 614, 618; *Cameriato* v. *United States* 4 Cir. 58 F. 2d 557, 558. And as pointed out above, a charge under the membership clause of the Smith Act is a charge of conspiracy. There is no magic in the use of the word "conspiracy" or "conspire"; and to charge that defendant became or remained a member of an organization advocating the forcible overthrow of the government is to charge that he became a party to an unlawful conspiracy for the purpose and makes applicable the rules relating to proof of guilt in joining a conspiracy.

4. *Other Contentions.*

Other contentions of defendant may be dealt with briefly. The contention that the evidence was not sufficient to sustain the verdict is manifestly so lacking in merit, in view of what has been said, as not to warrant further discussion. The requested prayers for instruction were properly declined as the law was fully covered in the court's charge in a light as favorable to the defendant as could possibly have been given, and the requested instructions would have served no purpose except to confuse the jury. The government's summation did not exceed the comment that is reasonably to be expected in jury arguments and the trial judge expressly instructed the jury that "the statements and arguments of the attorneys do not constitute evidence in the case." It is elementary that whether a mistrial shall be declared because of arguments of counsel is a matter resting in the sound discretion of the trial judge; and, certainly, there was no evidence of any abuse of discretion here.

The defendant's challenge to the grand jury on the ground that the clerk of the court and the jury commissioner had delegated their functions to others is without merit. The fact that they asked leaders of various organizations to furnish them with names of persons qualified to serve as jurors is unimportant so long as they themselves made the decision as to what names should go in the box. There is nothing to indicate that the persons whose names were placed in the jury box did not represent a fair cross section of the community or that defendant was prejudiced in any way by the method of selection. The questions propounded by the judge to the trial jury on the voir dire were sufficient for the selection of an impartial jury and that was all that defendant had a right to ask. The form of the questions to be propounded for that purpose is a matter resting in the discretion of the trial judge. *Dennis* v. *United States* 2 Cir. 183 F. 2d 201, 226. Defendant complains because the

judge did not excuse for cause three of the jurors who were subsequently peremptorily excused in the exercise of defendant's right to strike. The judge found, however, that these were impartial jurors and we would not be justified in setting aside his finding with regard thereto. *Reynolds* v. *United States* 98 U. S. 145, 156.

Defendant complains because the judge denied his request that his counsel be furnished with F. B. I. reports to the Department of Justice as to statements of the witnesses Clontz and Childs and that the selective service file of Childs be produced for examination by his counsel. These requests were properly denied. As to the F. B. I. reports on the statements of Clontz and Childs, there was no suggestion that they contained anything contradictory of testimony given by these witnesses on the trial, and the trial judge, who examined the statements, held that there was nothing in them contradictory of that testimony. There is nothing in the Constitution or elsewhere that permits a defendant to conduct a fishing expedition of the sort here proposed. The Constitution guarantees to a defendant accused of crime the right to be confronted by the witnesses against him, not the right to rummage through the secret files of the government in the hope that he may possibly find something contradictory of such witnesses. The same may be said with added force as to the selective service file of Childs, where the purpose was to rummage through a confidential file of the government in the hope of finding something that might contradict a witness as to a collateral matter. There is nothing to the contrary in *Gordon* v. *United States* 344 U. S. 414. There a key witness for the government had admitted on cross examination that he had given statements contradictory of his testimony to government agents and that sentence on him had been withheld for complicity in the same crime by the judge who advised him to tell the whole story

to the probation officers even though it might involve others. The decision was limited to the narrow case thus presented and expressly distinguished from "any broad or blind fishing expedition among documents possessed by the government on the chance that something impeaching might turn up," (see 344 U. S. at 418-419) which is the case here.

The defendant had a fair and impartial trial before an able and experienced trial judge. He was shown to be not only a member but also the chairman for the North and South Carolina District of the Communist Party, an organization shown to be an organization advocating the overthrow of the Government of the United States by force and violence, and held to be the basis of the criminal conspiracy charged in the Dennis, Frankfeld, Flynn, Mesarosh and Schneiderman cases, referred to above. Uncontradicted testimony as to statements by him showed that he was thoroughly aware of the unlawful aims and purposes of the party, was in sympathy with those aims and purposes and entered into its activities with complete understanding of what was involved. On the evidence before it, the jury was amply justified in finding him guilty of the crime charged; and we find nothing in the record which would justify us in awarding a new trial.

Affirmed.

APPENDIX B

1. Constitution of the United States

(a) Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(b) Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Statutes

(a) 18 U. S. C. Section 2385 (the Smith Act)

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

(b) 50 U. S. C. Section 783 (the Internal Security Act of 1950) —

(a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 782 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

* * *

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

* * *

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

(c) 50 U. S. C. Sections 841 and 843 (the Communist Control Act of 1954)

Section 841. The Congress finds and declares that the Communist Party of the United States, although

purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchial chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the

United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

Section 843. (a) Whoever knowingly and willfully become or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purposes of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof.

(d) 28 U. S. C. Section 1861 (Qualifications of jurors)

Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.

(e) 28 U. S. C. Section 1864 (Manner of drawing names of grand and petit jurors)

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

* * *

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

* * *